

§ 331.10

“harmless” procedural error), or to reconsider the decision where any essential part of the district engineer’s decision was not supported by accurate or sufficient information, or analysis, in the administrative record. The division engineer will document his decision on the merits of the appeal in writing, and provide a copy of this decision to the applicant (using certified mail) and the district engineer.

(c) The final decision of the division engineer on the merits of the appeal will conclude the administrative appeal process, and this decision will be filed in the administrative record for the project.

§ 331.10 Final Corps decision.

The final Corps decision on a permit application is the initial decision to issue or deny a permit, unless the applicant submits an RFA, and the division engineer accepts the RFA, pursuant to this Part. The final Corps decision on an appealed action is as follows:

(a) If the division engineer determines that the appeal is without merit, the final Corps decision is the district engineer’s letter advising the applicant that the division engineer has decided that the appeal is without merit, confirming the district engineer’s initial decision, and sending the permit denial or the proffered permit for signature to the appellant; or

(b) If the division engineer determines that the appeal has merit, the final Corps decision is the district engineer’s decision made pursuant to the division engineer’s remand of the appealed action. The division engineer will remand the decision to the district engineer with specific instructions to review the administrative record, and to further analyze or evaluate specific issues. If the district engineer determines that the effects of the district engineer’s reconsideration of the administrative record would be narrow in scope and impact, the district engineer must provide notification only to those parties who commented or participated in the original review, and would allow 15 days for the submission of supplemental comments. For permit decisions, where the district engineer determines that the effect of the district

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engineer’s reconsideration of the administrative record would be substantial in scope and impact, the district engineer’s review process will include issuance of a new public notice, and/or preparation of a supplemental environmental analysis and decision document (see 33 CFR 325.7). Subsequently, the district engineer’s decision made pursuant to the division engineer’s remand of the appealed action becomes the final Corps permit decision. Nothing in this part precludes the agencies’ authorities pursuant to Section 404(q) of the Clean Water Act.

§ 331.11 Unauthorized activities.

Approved JDs, permit denials, and declined permits associated with after-the-fact permit applications are appealable actions for the purposes of this part. If the Corps accepts an after-the-fact permit application, an administrative appeal of an approved JD, permit denial, or declined permit may be filed and processed in accordance with these regulations subject to the provisions of paragraphs (a), (b), and (c) of this section. An appeal of an approved JD associated with unauthorized activities will normally not be accepted unless the Corps accepts an after-the-fact permit application. However, in rare cases, the district engineer may accept an appeal of such an approved JD, if the district engineer determines that the interests of justice, fairness, and administrative efficiency would be served thereby. Furthermore, no such appeal will be accepted if the unauthorized activity is the subject of a referral to the Department of Justice or the EPA, or for which the EPA has the lead enforcement authority or has requested lead enforcement authority.

(a) *Initial corrective measures.* If the district engineer determines that initial corrective measures are necessary pursuant to 33 CFR 326.3(d), an RFA for an appealable action will not be accepted by the Corps, until the initial corrective measures have been completed to the satisfaction of the district engineer.

(b) *Penalties.* If an affected party requests, under this Section, an administrative appeal of an appealable action prior to the resolution of the unauthorized activity, and the division engineer

determines that the appeal has no merit, the responsible party remains subject to any civil, criminal, and administrative penalties as provided by law.

(c) *Tolling of statute of limitations.* Any person who appeals an approved JD associated with an unauthorized activity or applies for an after-the-fact permit, where the application is accepted and processed by the Corps, thereby agrees that the statute of limitations regarding any violation associated with that approved JD or application is tolled until one year after the final Corps decision, as defined at § 331.10. Moreover, the recipient of an approved JD associated with an unauthorized activity or applicant for an after-the-fact permit must also memorialize that agreement to toll the statute of limitations, by signing an agreement to that effect, in exchange for the Corps acceptance of

the after-the-fact permit application, and/or any administrative appeal (See 33 CFR 326.3(e)(1)(v)). No administrative appeal associated with an unauthorized activity or after-the-fact permit application will be accepted until such signed tolling agreement is furnished to the district engineer.

§ 331.12 Exhaustion of administrative remedies.

No affected party may file a legal action in the Federal courts based on a permit denial or a proffered permit until after a final Corps decision has been made and the appellant has exhausted all applicable administrative remedies under this part. The appellant is considered to have exhausted all administrative remedies when a final Corps permit decision is made in accordance with § 331.10.